In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE

On May 18, 1922, near 4:00 p. m., Edgar, aged 12, and Charles, aged 9, children of plaintiff, left their home with the objective of gathering wood from the city dump on defendant's property at Argo

Station. (R. 91.) Edgar was wheeling a wheelbarrow. (R. 91, Pltff's Ex. 95.) Their home was one-half mile from Second Avenue South and Dawson Street. From Second Avenue South and Dawson Street to dump was about one-half mile, over a well-defined and beaten footpath which had been in open, constant, notorious, and continuous use by the public generally for over twenty years. (R. 64-65-67-68-69-72-73-74-75-79-80-81-83-84-85-86 - 87 - 88-89-99-100-101.) Between fifty and sixty used path a day. (R. 68.)

The public had used the path for a short-cut into the city (R. 68-69); it was used by children going to and from school (R. 68-75); skating in winter in Argo Yard (R. 69-75-97); to go and come from work (R. 68-73); to go to and from the dump where they could obtain boxes, barrels, wood, refuse, tin, sheet metal, parts of autos, and condemned canned fruits and vegetables. (R. 69-74-80-81-86-97.)

The dump was an attractive nuisance, and people came from every side thereto. (R. 97.)

No sign had ever been posted by the defendant forbidding people from using the path. (R. 69-74-75-81-88-98-101.)

It was the only way for people of the south end to cross the track to get to the dump. (R. 69-83.)

About one-fourth or one-half mile from Second Avenue South and Dawson Street, path intersects with track No. 12. (R. 69-86, Pltff's Ex. 1.)

Many people would run in on the path with their automobiles and then walk over the path for the purpose of getting sheet metal and wood from the dump. (R. 74.)

Track No. 12 was used by the company to clean cars only. (R. 76-81-82-122-123.)

Track No. 12 had been in use since 1913. (R. 113.)

Cars have been left across the path, but the majority of times there was an opening left between the cars at the path. (R. 68.)

On both sides of the track was pasture and meadow land, the nearest house to the intersection being five blocks away. (R. 70-76-113-115.)

Before crossing the track, and as a continuation of the path, there were two planks over a ditch, and two trails leading up to the track. (Pltff's Ex. 2, R. 65-68-75-92.)

The defendant knew of the existence of the path, and that the public used it generally, and used it particularly for the purpose of getting wood from the dump. (R. 96-97.) They knew that there was a well-beaten path (R. 118-119), and planks over the ditch. (R. 118-119-120-132.) The yard master in charge of the Argo Yards at the time of the accident knew of the path and its use (R. 127-128), and that it had been used quite a while (R. 128-129-130), and that the public used it to go to get wood at the dump. (R. 130.)

The two boys entered the path at Second Avenue South and Dawson Street, and traveled along it until they reached track No. 12. Standing on the track, and extending south thereon at this time there were 57 box-cars, the south end of which was around a curve and could not be seen at the intersection with the path. (R. 91-97-124-126.)

As the boys came to the intersection of the path with the track, Charles leading and Edgar following with a wheelbarrow and axe, the end box-car was over the path, estimated from one foot to the length of a box-car. (R. 95-111.) Charles could not see the end of the cars. He looked down towards the end of the box-cars before he went across.

He could not see any man. He could not hear any whistle. He could not see any engine. He went across the track, and looked down the track. He did not see any switchman or employee of the railroad. He could not see any engine, nor hear any whistle; there was nothing that attracted his attention or warned him that those cars were going to move. Then Edgar came up to the track with the wheelbarrow and went to go across. He pushed the wheelbarrow between the tracks. When the wheelbarrow got on the track, the box-car next to them was about a foot away. Exhibit No. 5 is Charles and another boy and is the wheelbarrow that Edgar was pushing on the day at the time of the accident. The picture was taken at the place where Edgar was injured. Charles went to put the wheel over; it was in the position just like the picture. When they were in that position, the cars bumped and knocked the wheelbarrow and hit Edgar and knocked him down. Charles did not hear anything. The first thing he saw, it hit the wheelbarrow and knocked Edgar down. Edgar lay on the rail; his feet were on the real; and his head was on the other side of the rail. The car ran on his legs just enough to crush them, and then rolled back again. The fireman and engineer were in their places, and

the other three men were around and about the engine. None of the men in charge of the train was near the path. They could not see the path from their position. No watchman or switchman was on top of any of the cars. Without any warning whatever, the cars were pushed or kicked forward into and upon Edgar, and from his injuries he expired on the 22nd day of May. (Pltff's Ex. 5; R. 90-91-92-93-94-95-99-111-124-126.)

It was the custom for people when a car was over the path to walk down alongside of the cars until the end of the cars and then cross over. (R. 73-81-87.)

People could go to the dump down track No. 12, but would have to wheel a wheelbarrow between the tracks. (R. 132.)

First Avenue South was a high trestle. (R. 115.)

In Argo Yard there are twenty (20) tracks. (R. 128.)

LAW

The law as established in this state relative to accidents on railroad tracks at places other than established or public crossings is established by *Roth v. Union Depot Company*, 13 Wash. 525, 43 Pac. 641. The decision in this case, in which there is a discriminating review of cases on this point, stands affirmed by a long line of decisions in the state supreme court.

Steele v. N. P. Ry., 21 Wash. 293, 57 Pac. 820.

Eskilden v. Seattle, 29 Wash. 582, 70 Pac. 60.

McConkey v. O. W. R. & N., 35 Wash. 58, 76 Pac. 526.

Curtis v. O. W. R. & N., 36 Wash. 55, 78 Pac. 133.

Datta v. N. P. Ry., 36 Wash. 512, 79 Pac. 32.

Baker v. Tacoma & E. Ry., 44 Wash. 578, 87 Pac. 826.

Vinnette v. N. P. Ry., 47 Wash. 320, 91 Pac. 975.

Grant v. O. W. R. & N., 54 Wash. 683, 103 Pac. 1126.

Gregg v. King Co., 80 Wash. 204, 141 Pac. 340.

Imler v. N. P. Ry., 89 Wash. 534, 154 Pac. 1086.

Scharf v. Spokane & I. E. Ry., 92 Wash. 561, 159 Pac. 797.

And this decision is in accordance with the great weight of authority.

Hooker v. C. M. & St. P. R. R., 41 Am. & Eng. R. R. Cases 498.

Swift v. S. I. R. R. Co., 45 Am. & Eng. R. R. Cases 180.

Barry v. N. Y. C. R. R., 92 N. Y. 289.

Byrne v. N. Y. R. R., 104 N. Y. 362.

Kay v. Pennsylvania R. R., 65 Pa. St. 269.

33 Enc. of Law, 760-761.

33 Enc. of Law, 780-781.

23 Am. & Eng. Enc. of Law, 739-740.

33 Cyc., 766, 780.

In *Roth v. Union Depot Company*, the rule was given as follows:

"Where the public has been in the habit for a long time of using, at a point not in a traveled highway, the right of way of a railroad as a path in passing from one part of the city to another, and the railroad has knowledge of the fact that its right of way was so traveled by the public at almost every hour of the day, its acquiescence in the public use amounts to a license to so use its right of way, and imposes

the duty upon it to exercise reasonable care in the movement of its trains so as to protect from injury all persons crossing or traveling its tracks at that point." In Steele v N P Ry

"The great weight of authority is to the effect that it is negligence on the part of a railroad company to switch cars, unattended, down tracks in a populous city where many people are crossing the tracks over which the detached cars are switched. It is at all times and in all places an operation attended with more or less danger. In fact, this question was passed upon squarely by this court in the case of Roth v. Union Depot Co., *supra.*"

Steele v. N. P. Ry., 21 Wash. 287, 23 Am. & Eng. Enc. of Law, 2d. Ed. 745.

In *McConkey v. O. W. R. & N. Co.*, 35 Wash. 55, the court of this state drew a distinction between the relations of a trespasser and a licensee to a railroad company:

"In the case of the former, the company when moving its trains is under no obligations to keep a special look-out for him; but if he is discovered on the track in time to avoid injury by the exercise of reasonable care after such discovery, common humanity demands that such care should be used.

"In the case of a licensee, the company when moving its trains is charged with the additional duty of being in a state of expectancy of the probable presence of persons upon the track at places where travel thereon is known to be customary and fre-

quent. The care required in the case of a licensee, therefore, calls for both reasonable look-out in advance and a reasonable effort to avoid injury after discovery."

See, also, *Curtis v. O. W. R. & N. Co.*, 36 Wash. 55, 78 Pac. 133.

In *Imler v. N. P. Ry.*, 89 Wash. 527, in commenting upon the rule as expressed in *Roth v. Union Depot Company*, above, Chadwick, Judge, says:

"These cases . . . . are either crossing cases or cases from cities and towns where population is congested and the public has been accustomed to cross the tracks or to use them as a thoroughfare. And recoveries are allowed in such cases because a higher duty rests upon the railroad company under such circumstances. In moving trains over a crossing, streets of cities, in depot grounds, *or in switch yards*, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. The crossing cases rest in an implied license upon legal grounds. . . . . The company is held to a rule of strict accountability, because it is necessary for men and traffic to cross railroad tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so."

ARGUMENT

I

Plaintiff in error contends in his argument that the accident happened in the switch yard, and that the Roman boys were upon the switch track by no invitation of the defendant, expressed or implied; but were using the same purely for their own personal convenience.

They were neither trespassers nor naked licensees under the great weight of authority. They were here as a mattr of right and by invitation. The testimony was overwhelming, although vigorously contested and denied by the plaintiff in error, that there had been a notorious, constant, open, and continuous using of this path as a crossing by a great many people, with the knowledge of the railroad company. By acquiescing in its use, the company was charged with a knowledge that it was being so used and it was under the duty to exercise ordinary care to prevent injury. Even the least ordinary care would require a warning of some kind to be given, or that the railroad company would have someone in a position to see that the track was clear.

Counsel relies upon the recent decision of *Olsen v. Payne*, 116 Wash. 381, and quotes at length from that case, and quotes verbatim the citations thereof. *Olsen v. Payne*, is not a parallel case, nor has it any bearing upon the case at bar. There the court found that the boy was contributing to his own injuries so as to preclude his recovery in that he walked along the track, not across it; and he walked so close to the track, upon which a moving train was approaching, as to be struck by the engine or something projecting therefrom. He did not look back, and he failed to hear a train of sixty-seven cars and a laboring engine approaching him. The train had slowed down at the station to some four miles an hour; there were no other noises or trains to confuse him. The court found that he was guilty of contributory negligence; and it held that if he had been exercising such reasonable care as a boy of his age, experience, and intelligence must, as a matter of law, exercise under like circumstances, he must have heard it. There was nothing there to distract his attention.

There are two Washington citations given in support of *Olsen v. Payne, supra*:

> *O. W. R. & N. Co. v. Edgley*, 2 Wash. 409, 28 Pac. 993, 26 Am. St. 860.

Clark v. N. P. Ry. Co., 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508.

In *O. W. R. & N. Co. v. Edgley, supra*, a boy of nine and one-half years was, as a matter of law, guilty of such contributory negligence as to bar his recovery. He was stealing a ride on the running board of a switch engine. He had been forcibly removed and kicked off under similar circumstances several times before, and had been repeatedly warned and cautioned against such dangerous practices. In *Steele v. N. P. R. R. Co., supra*, Dunbar, Judge, in affirming the decision in the *Roth v. Union Depot Company* case, removed the decision in the case of *O. W. R. & N. Co. v. Edgley*, above cited, from all consideration in the case at bar with the statement that in that case the plaintiff was a naked trespasser who attempted to board a train of the defendant, unknown to the servants of the company, and he was hurt while engaged in an unlawful business.

Clark v. N. P. Ry. Co., supra, has no bearing upon the rule of law under facts such as exist in the case at bar. In that case, the injured party had the choice of another safe, public road parallel with the fence of the railroad company's yards. He elected to cross over the fence and over the tracks of the

defendant company where no crossing existed; was twice warned to get out and warned of his danger; and continued on in spite of the warnings; and hopped or jumped on a moving car and was injured.

The case of *Scharf v. Spokane Inland Empire R. R. Co.*, 92 Wash. 561, 159 Pac. 797, may support the ruling of *Olsen v. Payne, supra,* but it is inapplicable to the case at bar. In that case, the injured party walked along the middle of a railroad track, while on either side were wide paths equally as good which he might have traveled in safety; and, after seeing a switch engine, he never looked back again to see if it was in motion.

It is conceded that the Federal Courts apply the laws of the state in which causes of this nature arise, and require no citations of authority.

Plaintiff in error relies next upon the case of *Schmidt v. Pennsylvania Railroad Co.*, 181 Fed. 83, (New Jersey case), as sustaining his contention. That case may be distinguished from the line of decisions cited by respondent in error.

First. In that—

"The plaintiff was not struck and thrown down by the sudden movement imparted to the cars, but in some unexplained way his foot was caught by the

rail and he was thrown forward, the wheels coming on him and cutting off his foot while he lay in that position. *It is not altogether the same, therefore, as if the car being suddenly started bumped into him and threw him down.*" (Italics ours.)

The accident resulted because he tripped and fell, *without which* it apparently would not have occurred.

Second. The court admits—

"That it is a rule in some jurisdictions that where a railroad company for a long period of time has permitted the public to cross or travel along its right of way, it owes the duty of reasonable care to persons so using it, and cannot approach the place with moving trains without giving due and customary warning. See 23 Am. & Eng. Cyc. of Law, 2d Ed. 740, 741; Taylor v. Del. & Hud. Co., 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446; Swift v. Railroad, 123 N. Y. 645, 25 N. E. 378; Harriman v. Pittsburg etc. R. R., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Garner v. Trumbull, 94 Fed. 321, 36 C. C. A. 361."

23 Am. & Eng. Cyc. of Law, 2d Ed., 739, more clearly quotes the rule:

"Where the public have for a long time notoriously and constantly been in the habit of crossing a railroad track at a point not in a traveled public highway with the acquiescence of the railroad company, such acquiescence amounts to a license and

imposes upon the company the duty to exercise reasonable care to protect such persons from injury. Barry v. New York Central R. R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Swift v. Staten Island Rapid Transit R. R. Co., 123 N. Y. 645; Byrne v. New York Central Co., 104 N. Y. 362; Larimore v. Iron Company, 101 N. Y. 394."

Again, quoting from *Schmidt v. Pennsylvania R. R.*, above cited:

"But it is not the rule in New Jersey where, under such circumstances, persons using the crossing are regarded as mere licensees, toward whom the rule was only the duty of not doing wanton or willful injury."

After quoting a line of decisions arising in New Jersey, the court goes on to say that:

"These cases are declaratory of the local law as established by a long line of decisions of the highest courts of the state, recognized and enforced in this court."

Counsel relies upon another case as pertinent to the one at bar, i. e., *Cleveland C. C. & St. L. R. R. Co. v. Tartt*, 64 Fed. 823; and quotes at length from that case and the cases cited supporting it, on the assumption that these cases support its position. The facts of *Cleveland v. Tartt* are given at length in counsel's brief, and need not be again quoted,

except to show in what manner those facts are distinguishable. In the *Tartt* case, the distinguishing facts are these: The man and his son saw these trains travel at tremendous speed past their front doors every day, and they had knowledge of their tremendous speed. The decedent elected to walk along the right of way, "on or dangerously near the tracks of the company," knowing that the train was approaching at a tremendous speed, and looking back but once after seeing train approaching, and that only an instant before the accident, when he could have just as conveniently, and certainly more safely, walked along a public highway that ran parallel with and adjoining the railroad right of way.

In *Cahill v. C. M. & St. P. R. R. Co.*, 74 Fed. 285, in affirming the rule stated as being the weight of authority and as followed in this state in the *Roth v. Union Depot Co.*, *supra*, the court had this to say of the rule in *Cleveland v. Tartt*, and stating the rule given on page 27 of plaintiff in error's brief, the court continues and says:

"That much is due to a decent regard for human life and limb, and on the same principle it must be that in places on the tracks where people are accustomed to go and come frequently in considerable

numbers, and where by reason of such custom their presence upon the track is probable, and ought to be anticipated, those in charge of passing trains must use reasonable precautions to avoid injury, even of those who, in a strict sense, might be called trespassers. *But when a railroad company consents to the customary or frequent passing of people over its tracks, they cannot be deemed trespassers, and the duty is as clear as the necessity that locomotives and cars be moved with proper regard to their safety.*" (Italics ours.)

The adjudged cases on this subject are numerous. A leading case is *Barry v. Railroad Company, supra*, where there had been long acquiescence by the railroad to the crossing of its track. This was reaffirmed by *Byrne v. Railroad Company, supra;* also by *Taylor v. Canal Company*, 113 Pa. St. 162, 8 Atl. 43, where after a reference to the *Barry* case, the Supreme Court of Pennsylvania says:

"The principle clearly settled by the foregoing, and many other cases, is that when a railroad company has for years without objection permitted the public to cross its tracks at a place not in itself a public crossing, it owes the duty of reasonable care toward those using the crossing; and whether in a given case such reasonable care has been exercised or not is ordinarily a question for the jury under all of the evidence. In Roth v. Union Depot Company there is a discriminating review of the cases."

The case of *Railroad Company v. Godfrey*, 71 Ill. 500, which is cited in the extracts from *Cleveland v. Tart*, has been commented upon and disposed of by Dunbar, Judge, in *Roth v. Union Depot Company, supra*, as follows:

"The case of Illinois Central Railroad Co. v. Godfrey, 71 Ill. 500 (22 Am. Rep. 112) seems to decide squarely in favor of the appellant's contention that the simple acquiescence of a railroad company in the use of its track or right of way, by persons passing along it, as a foot-way, does not give such persons a right of way over the track, and does not impose upon the company the duty of protecting or providing safeguards for persons so using its grounds; and this case was followed by the supreme court of Illinois in the case of Blanchard v. Lake Shore etc. Railroad Co., 126 Ill. 416, (18 N. E. 799, 9 Am. St. Rep. 630); and the supreme court of Maryland in the case of B. & O. Railroad Co. v. State of Maryland to the use of Allison etc., reported in 19 Am. & Eng. R. R. Cas. 83. These cases hold that the relative rights of the railroad company and the injured party are not changed by reason of the acquiescence on the part of the company in the use of its track or right of way, and it follows from the logic of the cases that the company would be held responsible only for such gross negligence as indictated wilfulness. The case in 71 Ill. 500, cites, in support of its conclusion the case of Philadelphia & Reading Railroad Co. v. Hummell, *supra*, and Gillis v. Pennsylvania Railroad Co., 59 Pa. St. 199

(98 Am. Dec. 317). We think the Illinois supreme court mistook the logic of those cases, and such was the opinion of the supreme court of Pennsylvania, which reviewed the Hummell and Gillis cases in the case of Kay v. Pennsylvania Railroad Co., 65 Pa. St. 269 (3 Am. Rep. 628), and in some subsequent cases, and distinguished them from a case where license by use had been established."

Counsel contends that the court erred in not granting a non-suit at the close of the plaintiff's case, and in not granting a directed verdict at the close of all the testimony of said cases. Both motions were made on the ground that the evidence offered failed to show any negligence on the part of defendant to entitle recovery, and that the plaintiff's evidence established contributory negligence on the part of Edgar Roman and contributory negligence on the part of the parents. The court properly overruled both motions.

In *Steele v. N. P. Ry. Co., supra,* the court on page 294, says:

"The great weight of authority is to the effect that before a court will be justified in taking from the jury a question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them. . . . . (p. 300) 'it is frequently stated that when the facts are undisputed or conclusively proved, the question

of negligence is to be decided by the court. A better opinion, however, would seem to be that, in order to justify the withdrawal of the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable. Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury. (2 Thompson, Negligence, p. 1236.)' . . . . This court in McQuillan v. Seattle, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799, decided that the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and that it is only in rare cases that the court would be justified in withdrawing it from the jury. This, too, was in a case where the court below had granted a motion for non-suit; and we laid down the rule that if different results might honestly be reached by different minds, then negligence is not a question of law but one of fact for the jury."

Counsel digresses a moment and points out that, although used daily, the track had never before been the scene of an accident; and draws certain conclusions as to its lack of use by plaintiff therefrom. That is merely an assumption on the part of counsel; for the record clearly shows that the issue of the use of the crossing by a great many people for a number of years in an open, notorious, and constant manner such as under the law would auto-

matically charge the company with the knowledge of its use, and the issue of the company's knowledge, and every other issue involved in the case was sharply drawn and hotly contested. The law of this state is clearly indicated in the *Roth* case, *supra*, and the long list of Washington decisions affirming it, *supra*.

The court properly and correctly instructed the jury as to the law of the case (R. 144), and, if anything, instructed more strongly in favor of the railroad company than the evidence justified when it gave its instructions almost verbatim from the opinion rendered by Rudkin, Judge, in the case of *Hamlin v. Columbia & Puget Sound Railroad*, 37 Wash. 448, in which he says:

". . . . but it is not to be inferred from slight circumstances that a railroad company has granted to the public the joint use of its track between given points. The track is constructed primarily for the purpose of carrying passengers and freight in cars. . . . . To permit its use as a footpath greatly increases the danger of those traveling in cars, and it is not the policy of the law to encourage such use; and unless a clear right to be upon the track is shown, a footman thereon is to be regarded as a trespasser. In certain instances, of course, a joint use must be reserved to the public; for example, the public must have the right to cross at fixed places,

and it is usually held that a public crossing has been acquired by user on much less evidence than is required to establish a public way along the track—the one being in nearly every instance a necessity while the other is usually only a mere matter of convenience."

Counsel contends that Elliott on Railroads, volume 3, section 1154 (3d ed., par. 1657), is the law applicable to the case.

The last paragraph of counsels' quotation from Elliott on Railroads, correctly states the law of this state as to kicking and backing cars over a crossing. Elliott Railroads, 3d Ed., par. 1657, says:

". . . . . such conduct, without taking any precautions, is ordinarily negligence *per se.*"

II

The deceased took every conceivable precaution that even adults could have taken in crossing the track. He stopped, looked, and listened. He was in the exercise of even more than ordinary care. A child of immature years is not required to exercise the same degree of car and caution to avoid injury as is rquired of adults under similar circumstances.

Roth v. Union Depot Company ,supra.
29 Cyc. 535.

If the child was exercising ordinary care at the time of the injury, the rule of imputability can not apply.

7 Am. & Eng. Enc. of Law, 451.

And even if it did apply, ordinary care is all that is required of the parent, in watching and controlling a child.

29 Cyc. 556.

And it is not negligence to permit a child of discretion to cross the track where he is familiar with the place.

29 Cyc. 559.

However, the courts of this state have repudiated and denied the doctrine of imputability.

Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

Roth v. Union Depot Company, supra.

The question of the contributory negligence of the deceased and of the parents was a question for the jury.

Steele v. N. P. Ry., supra.

And the court properly instructed the jury on these matters.

III

Before the question that was objected to was answered, the witness, Barr, without objection, had testified that in Argo Yard there was skating on the swamp in winter time; quite a few used the skating place; that he had used it, and had seen other employees there, also children and lots of grown up people. People had used the path and track No. 12, and they had used track No. 13 to the skating place. He testified there was wood at the dump, and that he had noticed people using the path for the purpose of gathering wood. That he knew, as an official of the company, that people were using the path. (R. 97.)

Counsel attempts to explain away the question Barr had answered the moment before, and says that 'it was evident that the jury did not hear.' There is nothing in the record to bear out that statement. We might equally say that it was evident that the evidence was so good, showing knowledge of the company's employees of the use of the path, that the question was repeated in order to fix it in the mind of the jury.

IV

The court very properly refused to grant the instruction requested as to deviation from the path.

"If there is any evidence from which the jury might justifiably find the existence or non-existence of the fact in issue and the evidence is conflicting or is such that reasonable men might arrive at different conclusions therefrom, the issue should be submitted to the jury for determination; and in such a case it is error for the court to take the question from them by non-suit, dismissal, direction of a verdict, or instruction." (33 Cyc. of Law, 896.)

A requested instruction, covered by other instructions given, may be properly refused. (33 Cyc. of Law, 917.) Also an instruction that facts would be evidence of contributory negligence is very properly refused.

Mitchell v. Tacoma Ry. Co., 9 Wash. 121.

To have given the instruction asked for by counsel in the case at bar would have been taking the matter out of the hands of the jury, and would have required the court to pass upon it as a matter of law.

Counsel relies upon *Southern R. R. Co. v. Fisk*, 159 Fed. 373. Here the court said that where a

traveler was injured while crossing a railroad track and the injury would have been avoided by the exercise of care on the part of the train operatives, the mere fact that the traveler deviated from the street or highway boundary line at the crossing without obscuring his purpose of crossing or making such care unavailable for his protection did not absolve the railway company from its liability for negligence. Whether he is a trespasser or not under all the facts and circumstances in the case is a question for the jury. The court held that it was not error to refuse the railroad company a directed verdict.

V

The defendant demurred to the original complaints. Its demurrers were only on the ground that the complaints did not state facts sufficient to constitute a cause of action. (R. 12-13.) There were no demurrers interposed by defendant to the first or second amended complaints. At no stage of the proceedings did defendant interpose a demurrer or answer on the ground that the plaintiff had no legal capacity to sue.

Remington's Compiled Code, section 259, provides the grounds of demurrer as follows:

"The defendant may demur to the complaint when it shall appear upon the face thereof,—

"(2) That the plaintiff has no legal capacity to sue."

Where no objection is made in the court below, either by demurrer or answer, to an alleged defect in the parties plaintiff, the question can not be raised in the supreme court:

Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760.

Hannigan v. Roth, 12 Wash. 695, 44 Pac. 256.

Jenkins v. Columbia Land Co., 13 Wash. 502, 43 Pac. 328.

Birmingham v. Cheetham, 19 Wash. 665.

James v. James, 35 Wash. 665.

37 Century Digest Co., 2592-2595, Sec. 170; 30 D. N. S. 152 note.

Birmingham v. Cheetham, supra, on page 665, in construing the above section, said:

"Section 189 of the code of procedure provides that the defendant may demur to the complaint when it appears upon the face thereof '(2) that the plaintiff has no legal capacity to sue,' or '(6) that the complaint does not state facts sufficient to constitute a cause of action.' Each of the grounds of demurrer specified by this section is separate and distinct from all others, and has no relation whatever to any other; and we therefore entirely agree

with the contention of counsel for the appellant that the question of want of legal capacity to sue was not raised by this demurrer in the court below, and therefore cannot be considered in this court."

In the case of *James v. James, supra,* on page 660, the court said:

"The appellant first contends that the allegations of the complaint in reference to the manner title was acquired to the real property in question show that the heirs at law of the deceased wife of the appellant have an interest in an undivided half of the property under the rule of the case of Ahern v. Ahern, 31 Wash. 334, and as the respondent's interests are confined to the other undivided half, it is of no concern to him who claim to be heirs at law of the first. But this, it seems to us, is only another way of saying that the respondent has no legal capacity to sue, and to that objection it is a sufficient answer to say that appellant did not demur to the complaint on that ground. The demurrer filed, as we have said, was a general demurrer, one going to the sufficiency of the complaint to state a cause of action, and such a demurrer does not raise the question of the capacity of the plaintiff to maintain the action. The want of legal capacity to sue is made a special ground of demurrer by the statute, and to raise it by demurrer it must be pointed out specially."

Objections relating to parties must generally be made promptly or they will be waived. 71 Am. Enc. of Law, 736.

A demurrer to complaint for want of sufficient facts presents no question as to jurisdiction of court,

Whitewater v. Bridget, 94 Ind. 216;

and does not reach a defect of parties.

Grain v. Aldrich, 38 Cal. 514.

The question raised has been decided adversely to counsels' contention by this court in the case of *Puget Sound Traction, Light & Power Co. v. Frescoln*, 245 Fed. 301, by the court through Judge Hunt speaking. After quoting in full sections 183 and 194 from Remington & Ballinger's Codes, volume 1, he says:

"It is true there has been but one negligent action; but that negligent action has given rise to two wrongs, one against the estate of the injured man, the other against his dependent relatives. In the survivor case (194), all the heirs of the deceased are beneficiaries of the verdict; while under the death statutes (183) only dependent relatives may be beneficiaries of the recovery. In the first action prosecuted by Mrs. Frescoln, she could not have recovered damages for the death of her husband. . . . . Swanson v. Pacific Shipping Company, 60 Wash. 87, 110 Pac. 795, sections 183 and 194, hereinbefore quoted, were considered by the supreme court and it was held that each of the sections was intended to serve its separate purpose and

must be so construed as to secure that result. . . . . This court has also discussed the general question and in N. P. Ry. Co. v. Adams, 116 Fed. 324, 54 C. C. A. 196, on a writ of error to the Circuit Court for the District of Washington held that under the statutes heretofore quoted there was a right of action in favor of the heirs or personal representatives of a person whose death was caused by the negligence of another to recover such damages as might be just, as a new and separate cause of action for damages for the loss sustained by such beneficiaries, and that such right was not dependent upon the right of the deceased to maintain an action for the act which caused his death had he survived. That decision in the case was reversed (in N. P. R. R. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513) but there was no intimation that the view of this court as to the rights of action was not correct."

The facts of this case disclose that an action was commenced in the state court by the injured party for damages for injuries caused by the defendant. Before trial he died, and his wife, as administratrix, was substituted as party plaintiff (194). She recovered judgment. Later she commenced this action for wrongful death under section 183, and she obtained a judgment. The question before this court was whether under the statutes of Washington, where one receiving personal injuries as the re-

sult of negligence of another and during his life beginning an action therefor, but before trial dies as a result of injuries inflicted, and his widow, as administratrix, and in her own right, revives and carries on such action for personal injuries to judgment, an independent action for wrongful death will lie in favor of the widow in her individual capacity, and judgment was affirmed.

Since this decision, section 183 as quoted has been repealed, and now is as quoted in apellant's brief, requiring the administrator only to sue.

The controlling case under the law as it stands today is *Machek v. Seattle*, 118 Wash. 42, 203 Pac. 25, which is in line with *Puget Sound Traction, Light & Power Co. v. Frescoln, supra.* In *Machek v. Seattle, supra,* on page 47, the court says:

"The cases of Mesher v. Osborne and Brodie v. Washington Water Power Co., *supra,* show the distinctions between the actions maintainable under paragraphs 183 and 194.

"Taking the exact situation which is presented by the complaint in this case, involving the death of a minor leaving no husband or child or children, but only dependent parents, we have this result, that the administrator could maintain an action for the benefit of the parents to recover the amount that would have been contributed by the deceased to their support, this amount not being limited to what

would have been furnished during decedent's minority only. Or, in the alternative, the parents themselves whether dependent or not, could maintain an action in their own name for the loss of services of the minor, from the time the loss was occasioned until such time as the minor would have arrived at majority. And in addition to either one of the foregoing actions under either paragraph 183 or 184, the administrator could maintain an action under paragraph 194 in favor of the dependent parents for the damages suffered by the deceased from the time of the injury until death. This action is entirely independent of actions under either paragraph 183 or paragraph 184, and could be concurrently maintained with actions under either one of those sections. A complaint stating a cause of action under this section should not have been dismissed, as the cause of action stated could not have been affected by the fact, if it were one, that an action had already been begun under either paragraph 183 or paragraph 184."

Discussing section 194, in *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, the court said:

"Section 194 falls within the class of statutes to which the rules of liberal construction and interposition of terms applies, for no right of action is created by it. It merely recognizes a right of action that existed in a living person whether at common law or in virtue of some statute at the time of the death of the party. The right was in the 'person' at the time of death. Such a right is one in kind with a chose in action."

It is a general rule that the title to a chose in action and the right to sue thereon are in the administrator.

18 C. J. 902, Sec. 182 (4).

Under the pure survival statutes, where no new cause of action is created, but the cause of action of decedent is made to survive, the action must be brought by his personal representative.

17 C. J. 1265.

The original complaints were drawn under the authority of *Howe v. Whitman County*, but, after more mature consideration and after a close study of the decisions given in *Machek v. Seattle* and *Puget Sound Traction, Light & Power Company v. Frescoln, supra*, it was deemed advisable to file a second amended complaint.

No proceedings were brought up in the transcript why the second amended complaints were filed on February 15th. But it is significant that no objection was made to the court thereto, and the fact that both answers to the second amended complaints were filed by counsel thereafter on the 20th day of February leads to the inevitable conclusion that consent was obtained from the court that both sides could file their formal pleadings after the case was disposed of.

CONCLUSION

In conclusion, we wish to call the court's attention to the facts:

(a) That the existence of the path over the railroad track, and its open, notorious, and constant use by a great many people was overwhelmingly established by many disinterested witnesses.

(b) That the knowledge of the railroad company of the use of this path was clearly established in the face of the denial of the company.

(c) That the line of cars was switched or kicked, unattended, down the track and across a place where many people were crossing and in a populous city, without any warning of any character being given, and without any one in a position to see whether or not the track was clear.

(d) That the jury was fully and correctly instructed upon all questions of law.

(e) That the question of the plaintiff's capacity to sue was never raised in the court below, and can not be raised for the first time in this court on appeal.

We respectfully submit that there were no errors, and that the judgment of the court be affirmed.

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